No. 34852-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

State of Washington,

Respondent,

v.

Jason Michael Catling,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Any court order requiring Mr. Catling to pay $25 a month in mandatory legal financial obligations is void under federal law, and the Washington statutes that require a social security recipient to use social security funds to pay off legal financial obligations violate the Supremacy Clause.

Federal law prohibits the State from compelling an individual to satisfy a debt through social security income. 42 U.S.C. § 407 (a); *City of Richland v. Wakefield*, 186 Wn.2d 596, 609, 380 P.3d 459 (2016). Jason Michael Catling receives $753 a month in social security disability, which is his sole source of income. 2RP 3, 8; CP 38. Nevertheless, the sentencing court ordered Mr. Catling to pay $800 in mandatory legal financial obligations (LFOs). 2RP 7; CP 80-81. Because Mr. Catling can only pay this debt with his social security income, the court's order is void under federal law. *See* Br. of Appellant at 4-8. Additionally, as applied to social security recipients like Mr. Catling, Washington's mandatory LFO statutes are at odds with the Supremacy Clause. *Id*. at 8-10.

a. The State's concessions are well-taken.

The State concedes, "the trial court erred in ordering the defendant to pay [LFOs] at a rate of $25 per month" and also concedes, "in cases involving the Federal Social Security anti-attachment statute, it is irrelevant whether the [LFO] is mandatory or discretionary. The court

cannot enforce the collection of legal financial obligations." Resp. Br. at 8-9. This concession is well-taken, and Mr. Catling encourages this Court to accept the State's concession.

The State has also endorsed one of the court's holdings in *In re Lampart*, 306 Mich. App. 226, 242, 856 N.W.2d 192 (2014), which holds that even the threat of contempt procedures or jailing for failure to pay "is 'other legal process,' which violates the anti-attachment provisions of the Social Security Act." Resp. Br. at 10-11. Mr. Catling also supports the State's endorsement of this portion of the ruling in *Lampart*.

Despite these concessions, the State maintains the various mandatory LFO statutes do not violate the Supremacy Clause. Resp. Br. at 13. Additionally, the State attempts to craft a "solution" to its inability to reach Mr. Catling's social security funds that is contrary to the Supremacy Clause, constitutes "other legal process," and renders individuals with disabilities unable to vacate their criminal records.

b. The Washington statutes that require a social security recipient to use social security funds to pay off legal financial obligations conflict with 42 U.S.C. § 407(a) and violate the Supremacy Clause.

As applied to social security recipients like Mr. Catling, all of the Washington statutes that impose mandatory legal financial obligations on social security recipients– RCW 7.68.035(1)(a), RCW 36.18.020(2)(h),

and RCW 43.43.7541 – conflict with 42 U.S.C. § 407 (a) and therefore violate the Supremacy Clause. U.S. Const. art. VI, pt. II; Br. of Appellant at 6-8. However, the State argues these statutes do not violate the Supremacy Clause, and seemingly argues that any constitutional challenges to LFOs can only be invoked when the State attempts to collect LFOs. Resp. Br. at 10. The State also argues the mandatory LFO statutes do not violate the Supremacy Clause because these statutes "do not mandate the procedure by which a court should collect those obligations, or in any way dictate that a court is to collect those funds from a defendant's federal social security benefits." Resp. Br. at 13. All of these arguments are unavailing.

i. A defendant can assert a constitutional claim surrounding the sentencing court's imposition of fines at the time of sentencing.

A defendant may assert a constitutional challenge to the sentencing court's imposition of fines at the time the sentencing court imposes them. *See, e.g.*, *State v. Barklind*, 87 Wn.2d 814, 815, 557 P.2d 314 (1976), *Southern Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012). However, the State relies on our Supreme Court's rulings in *Curry* and *Blank* and our Supreme Court's reliance on *U.S. v. Pagan*, 785 F.2d 378 (2nd Cir. 1986) in these cases to seemingly argue constitutional challenges can only be invoked at the time the State

attempts to collect LFOs. Resp. Br. at 9-10; *see generally State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992); *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997).

The State's assertion is incorrect. The rulings in these cases do not categorically bar a defendant from asserting any constitutional claim at the time a sentencing court imposes fines; rather, the rulings in *Pagan* and *Curry* narrowly hold that constitutional challenges based *specifically* on the defendant's indigency and inability to pay LFOs are not ripe for review until the State attempts to collect the money from the defendant. *See* 785 F.2d 378 (merely holding that the defendant's argument that the impositions of LFOs was unconstitutional due to his indigency under was not ripe for review until "a time when [the defendant] is unable, through no fault of his own, to pay the [LFOs]"); *accord* 118 Wn.2d 911.

ii. Washington's mandatory LFO statutes violate the Supremacy Clause because they force courts to impose mandatory LFOs on social security recipients.

As applied to social security recipients like Mr. Catling, Washington's mandatory LFO statutes violate the Supremacy Clause of the United States Constitution because they force courts to impose mandatory LFOs on social security recipients. U.S. Const. art. VI, pt. II. However, the State maintains that because LFO statutes neither "dictate that a court is to collect those funds from a defendant's federal social

security benefits" nor "mandate the procedure by which a court should collect those obligations," the statutes are in accordance with the federal constitution. Resp. Br. at 13. This argument is unpersuasive.

The mandatory LFO statutes require Washington courts to unlawfully *attempt* to attach Mr. Catling's social security benefits, which is contrary to the Supremacy Clause. *See* Br. of Appellant at 8-10. In *Bennett v. Arkansas*, the petitioners challenged a statute that explicitly authorized the State to seize an incarcerated person's social security benefits. 485 U.S. 395, 396, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988). The petitioners argued the statute violated the Supremacy Clause of the federal constitution because it "*permits the State to attach funds that federal law exempts from legal process.*" *Id*. (emphasis added). The Supreme Court agreed and found that the Arkansas statute conflicted with the Supremacy Clause because "there is a clear inconsistency between the *Arkansas statute* and 42 U.S.C. § 407 (a). Section 407(a) *unambiguously* rules out *any attempt* to attach Social Security Benefits." *Id*. at 397 (emphasis added).

Similarly, Washington's mandatory legal financial obligations, as applied to Mr. Catling, permit the State to attach funds that federal law exempts from legal process, which is contrary to the Supremacy Clause. While it is true that RCW 7.68.035(1)(a), RCW 36.18.020(2)(h), and

RCW 43.43.7541 do not explicitly require courts to impose LFOs on social security recipients, they leave courts with no choice but to *attempt* to attach a social security recipient's social security funds. The word "attempt" means, "to make an effort to do, accomplish, solve, or effect." *Attempt*, Merriam Webster.[1] *See* RCW 7.68.035(1)(a) (1)(a) ("when any person is found guilty in any superior court of having committed a crime… there *shall be imposed by the court* upon such convicted person a penalty assessment"); RCW 36.18.020(2)(h) ("upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case *shall* be liable for a fee of two hundred dollars"); RCW 43.43.7541 ("every sentence imposed for a crime specified in RCW 43.43.754 *must* include a fee of one hundred dollars"). (emphasis added).

These statutes contain no provisions that grant sentencing courts the discretion to forego "attempt[ing]" to attach social security benefits (e.g., "shall not conflict or interfere with an act of Congress," or "shall not conflict or interfere with federal law").

[1] https://www.merriam-webster.com/dictionary/attempt (last visited Aug. 30, 2017).

Contrary to the State's claim, the procedure used to obtain a defendant's social security funds is irrelevant to whether the mandatory LFO statutes conflict with the Supremacy Clause. Washington's mandatory LFO statutes require courts to "attempt" to attach social security benefits, and therefore these statutes "amount to a conflict under the Supremacy Clause –a conflict the State cannot win." *Bennett*, 485 U.S. at 397 (referencing *Rose v. Arkansas State Police*, 479 U.S. 1, 107 S. Ct. 334, 93 L. Ed. 2d 183 (1986)).

c. The State's proposed "solution" to its inability to reach Mr. Catling's social security funds is contrary to the Supremacy Clause, constitutes "other legal process," and is contrary to the Americans with Disabilities Act.

The State asserts the "'true issue' in this case [is]: what is a trial court's recourse when faced with a legislative mandate to impose mandatory legal financial obligations upon a defendant who receives social security disability benefits, and has no other source of income?" Resp. Br. at 9. The State goes on to suggest the "solution" to this "may be found in RCW 9.94A.760(7)(b)." Resp. Br. at 14. The statute provides as follows:

> Subsequent to any period of supervision, or if the department is not authorized to supervise the offender in the community, the county clerk may make a recommendation to the court that the offender's monthly payment schedule be modified so as to reflect a change in financial circumstances. If the county clerk sets the monthly payment amount, or if the department set the monthly payment

> amount and the department has subsequently turned the collection of the legal financial obligation over to the county clerk, the clerk may modify the monthly payment amount without the matter being returned to the court. During the period of repayment, the county clerk may require the offender to report to the clerk for the purpose of reviewing the appropriateness of the collection schedule for the legal financial obligation. During this reporting, the offender is required under oath to respond truthfully and honestly to all questions concerning earning capabilities and the location and nature of all property or financial assets. The offender shall bring all documents requested by the county clerk in order to prepare the collection schedule.

RCW 9.94A.760(7)(b).

However, the State's proposed "solution" is untenable. This is because this proposal is still is contrary to the Supremacy Clause, constitutes "other legal process," and renders individuals with disabilities unable to vacate their criminal records.

> *i. The State's "solution" still requires the court and the clerk to use a "legal process" to obtain a defendant's social security funds.*

From the outset, it is important to note that this "solution" still requires that judges issue an order asking a clerk to later attempt to reach the defendant's social security funds, which constitutes "other legal process" and is antithetical to the anti-attachment provision of the social security act. Under 42 U.S.C. § 407 (a) of the Social Security Act,

> The right of any person to any future payment under this subchapter *shall not* be transferable or assignable, at law or in equity, and *none* of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy,

> attachment, garnishment, or *other legal process*, or to the operation of any bankruptcy or insolvency law.

(emphasis added).

The United States Supreme Court defined "other legal process" in *Washington State Dep't of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003). The court defined "other legal process" as follows:

> [a] process much like the processes of execution, levy, attachment, and garnishment, and at minimum, [which] would seem to require utilization of some *judicial* or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or *secure discharge* of an *allegedly existing or anticipated liability.*

Id. (emphasis added).

The sentencing court's order to the clerk would plainly be used to *secure discharge* of an *allegedly existing or anticipated liability*. Therefore, this "solution" still constitutes an unlawful attempt to attach social security benefits.

Moreover, the State's proposed solution also constitutes "other legal process" because the statute grants a clerk a quasi-judicial mechanism to summon a defendant to court in an effort to attempt to attach the defendant's social security funds. In relevant part, the statute states:

> During the period of repayment, the county clerk *may require the offender to report to the clerk* for the purpose of reviewing the appropriateness of the collection schedule for the legal financial obligation. During this reporting, *the offender is required under oath to respond truthfully and honestly to all questions concerning earning capabilities and the location and nature of all property or financial assets. The offender shall bring all documents requested by the county clerk in order to prepare the collection schedule.*

RCW 9.94A.760(7)(b)(emphasis added).

The clerk's ability to 1) require the defendant to appear before him or her; 2) command the defendant to respond to questions "under oath;" and 3) demand that the defendant bring documentation of his financial assets certainly consists of a "quasi-judicial mechanism" used to "secure discharge of an allegedly existing or anticipated liability" under *Keffeller*. 537 U.S. at 385.

Additionally, this "solution" may result in warrants for arrest if the defendant does not show up to the clerk's office to give the clerk an update on his finances. *See State v. Nason*, 168 Wn.2d 936, 233 P.3d 848 (2010) (describing a clerk's decision to issue a violation report due to the defendant's nonpayment, leading to a hearing where the defendant failed to appear and a subsequent warrant for the defendant's arrest). But the State has already endorsed the view that, "even the threat of contempt procedures, or jailing for failure to pay, is 'other legal process,' which

violates the anti-attachment provisions of the Social Security Act." Resp. Br. at 10-11.

ii. The State's proposed "solution" unlawfully and unfairly leaves ex-offenders with disabilities with the inability to vacate their criminal records.

The State's proposed "solution" dangerously leaves ex-offenders with disabilities without the ability to vacate their criminal records. Social Security "provides benefits to a person with a disability so severe that she is 'unable to do her previous work' and 'cannot…engage in any other kind of substantial gainful work which exists in the national economy.'" *Cleveland v. Policy Management Systems Corp.*, 565 U.S. 795, 797, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999) (referencing 42 U.S.C. § 423(d)(2)(a)). Indeed, social security provides a means of living for people with disabilities so serious that they may result in, or persist until, death. 42 U.S.C. § 1382.

Prior to July 2000, the State only possessed a ten year time frame to collect LFOs; however, our Legislature "extend[ed] the court's jurisdiction for the lifetime of the offender or until all LFOs are satisfied" for crimes committed after July of 2000. *State v. Gossage*, 165 Wn.2d 1, 8, 195 P.3d 525 (2008). Now, an ex-offender can only receive a certificate of discharge and vacate his criminal conviction after all of his legal financial obligations are paid off. RCW 9.94A.637(1)(a); RCW

9.94A.640. This order restores many of the ex-offender's civil rights and enhances an ex-offender's chances of accessing housing because once the conviction is vacated, the previous conviction is less likely to show up in background checks. RCW 9.94A.637(5); Dash DeJarnatt, *Changing the Way Adult Convictions are Vacated in Washington State*, 12 Seattle J. for Soc. Just. 1045, 1054 (2014).

Thus, the State's proposed "solution" leaves people with lifelong disabilities and no future source of income other than social security disability without the ability to vacate their criminal conviction(s). Such individuals will be forced to go to the clerk's office, reaffirm that they are not receiving money from another source, and leave the clerk's office without ever having the ability to vacate their record. The cycle is unending.

Because the State's proposed scheme precludes people with disabilities from vacating their record, this "solution" would likely violate the Americans with Disabilities Act (ADA). The United States Congress enacted the ADA in 1990, expressly finding that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society." 42 U.S.C. § 12101(a)(1). The Legislature's purpose in enacting the ADA was to eliminate discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1).

The ADA prohibits the State from excluding individuals, by reason of disability, "from participation in or [denying them of] the benefits of the services, programs, or activities" the State provides. 42 U.S.C. § 12132. The Act further affirms that the State cannot discriminate against an individual with disabilities. *Id*. Moreover, in relevant part, the Act specially provides that the State cannot:

> Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
>
> Directly or through contractual arrangements, utilize criteria or methods of administration […] that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;
>
> Administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may [the State] establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability.

Nondiscrimination on the Basis of Disability in State & Local Government Services, 28 C.F.R. § 35.130 (1)(i),(3)(i), (6).

Mr. Catling receives social security disability income on the basis of his lifelong disability, and the State's proposal would bar him from ever vacating his conviction. 2RP 8-9. Because this proposal would bar him from enjoying a benefit (a certificate of discharge) due largely to his

disability, the State's proposal is also contrary to the Americans with Disabilities Act.

2. The sentencing court failed to make the required inquiry as to Mr. Catling's ability to pay under RCW 9.94A.777.

Despite evidence that Mr. Catling has a mental illness, the sentencing court failed to determine whether Mr. Catling possessed the ability to pay legal financial obligations, which requires reversal. If a defendant has a mental illness, a court must assess the defendant's ability to pay all LFOs (except restitution or the victim penalty assessment) before imposing LFOs. RCW 9.94A.777(1); *accord State v. Tedder*, 194 Wn. App. 753, 758, 378 P.3d 246 (2016).

However, the State argues this Court should not consider this issue because, at sentencing, Mr. Catling did not object to the imposition of LFOs on the basis of his mental health issues. Resp. Br. at 16. Citing policy reasons, both this Court and the Washington Supreme Court have exercised its RAP 2.5(a) discretion to reach the merits of unpreserved LFO issues. This Court should do the same. *See Tedder*, 194 Wn. App. 753 (reaching the merits of unpreserved RCW 9.94A.777(1) LFO issue); *State v. Malone*, 193 Wn. App. 762, 376 P.3d 443 (2016) (exercising RAP 2.5(a) discretion to reach the merits of unpreserved discretionary LFO challenge); *accord State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

B. CONCLUSION

For the reasons stated in this brief and in his opening brief, Mr. Catling asks this court to accept the State's concession, find that the mandatory LFO statutes in Washington State are void (as applied to social security recipients) under the Supremacy Clause, reject the State's proposed "solution" to its inability to reach his social security funds, and, alternatively, exercise its RAP 2.5(a) discretion to reach the merits of his LFO claim based RCW 9.94A.777(1).

DATED this 1st day of September, 2017.

Respectfully submitted,

/s Sara S. Taboada

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	)	
v.	)	NO. 34852-1-III
	)	
JASON CATLING,	)	
	)	
APPELLANT.	)	

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